Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1153

PHYLLIS N. FIELDS, Individually and as Guardian of Janet Marie Fields, Lori Alison Fields, and Jan Scott Fields - - Petitioners

versus

THE TRAVELERS INSURANCE COMPANY;
BARBARA G. FIELDS, Individually and as Administratrix of the Estate of Jan A. Fields, Deceased; and
CHARLES P. WAGNER, Administrator of the Estate of Jan A. Fields - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered December 13, 1971.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Kentucky, Eastern Division, is reported in 323 F. Supp. 387 and is printed in Appendix A hereto. The opinion of the Court of Appeals is reported in 451 F. 2d 1292 and is printed in Appendix B hereto.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Rule 19(1) of the Rules of the Supreme Court of the United States Provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion indicate the character of reasons which will be considered:
>
> '(a) . . .
>
> '(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision'."

QUESTIONS PRESENTED FOR REVIEW

1. The application of the Kentucky restoration statute to Ohio insurance contracts, so as to deprive the named beneficiary of the policy proceeds, constitutes a denial of due process to the named beneficiary,

who would receive the policy proceeds under Ohio law, and the Full Faith and Credit Clause may not be used to deprive the named beneficiary of her rights under those contracts of insurance.

2. Where the Sixth and Seventh Circuit Courts of Appeal have answered such a question as the above in directly opposite ways, this Court should grant certiorari, in order to determine the law and to resolve the important constitutional issues of this case.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Article IV, Section 1 of the Constitution of the United States:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. * * *"

2. Section 1 of Amendment XIV of the Constitution of the United States:

> "* * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law. * * * *"

3. Kentucky Revised Code, Section 403.060(2):

> "Upon final judgment of divorce from the bonds of matrimony, each party shall be restored all the property, not disposed of at the beginning of the action, that he or she obtained from or through the other before or during the marriage and in consideration of the marriage."

4. Kentucky Revised Statute, Section 403.065:

> "Every judgment for a divorce from the bond of matrimony shall contain an order restoring any

property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during the marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may herein determine the same in a summary manner, after ten days' notice to the party so failing."

STATEMENT OF THE CASE

The decedent, Jan A. Fields (hereinafter referred to as Jan) and the Petitioner, Phyllis Fields (hereinafter referred to as Phyllis) were married on July 28, 1951. Janet Marie Fields, Lori Alison Fields and Jan Scott Fields (hereinafter referred to as the Children) were born of the marriage. On the 27th day of September, 1966, Jan and Phyllis were divorced by order of the Kenton Circuit Court, Commonwealth of Kentucky. The judgment contained the required "restoration clause", KRS 403.065. Also incorporated in that Kentucky divorce judgment was an agreement between Phyllis and Jan. This agreement disposed of various matters of property and child support. However, it failed to mention certain insurance policies upon the life of Jan, which policies were part of his fringe benefits as an employee of an Ohio paper manufacturing company. One of these policies of insurance was for the face amount of $100,000 and one for $3,000.

Jan had, prior to the divorce, designated Phyllis to be the beneficiary of these policies of insurance. At no time subsequent to this designation did Jan ever change the named beneficiary of these policies or evince any desire to do so, although ample time for him to do so had passed between the divorce and his death.

After Jan and Phyllis were divorced, Jan married Barbara. On September 9, 1969, Jan died in a plane crash in the State of Indiana, still an employee of the Ohio paper manufacturing concern and still married to Barbara; at the time of Jan's death, Phyllis was still named as beneficiary on the policies in question.

Barbara was appointed Administratrix of Jan's Estate, he being a resident of Hamilton County, Ohio for some time prior to his death; later Charles Wagner was appointed as Ancillary Administrator of Jan's Estate in Kentucky.

Jan died intestate and his estate will pass according to the laws of descent and distribution of the State of Ohio; the effect of rulings of the Courts below was to distribute the proceeds of the insurance policies to Jan's Estate, thereby depriving his intended beneficiary, Phyllis, of the funds.

In addition it need only be pointed out that both insurance policies provided that they were issued and delivered in the State of Ohio and were to be governed by the laws of Ohio.

The action commenced when the Travelers Insurance Company (hereinafter referred to as Travelers), instituted a Complaint in Interpleader in the Federal District Court for the Eastern District of

Kentucky. Named as parties were Barbara G. Fields (hereinafter referred to as Barbara), who is Ohio Administratrix of Jan's Estate, with the later addition of Charles Paul Wagner as Kentucky Ancillary Administrator of Jan's Estate. Also named as Defendant was Phyllis, the designated beneficiary, she being named both individually and as Guardian of the Children. Answer was filed by all parties Defendant. At a later date, Charles Wagner and Barbara moved for summary judgment, as did Phyllis and the Children. The District Court heard argument of counsel for the respective parties and on the 16th of December, 1970, granted summary judgment in favor of Barbara. Appropriate notice of appeal was filed by Phyllis and the Children, bringing the matter before the Sixth Circuit Court of Appeals.

In a decision filed December 13, 1971, the Court of Appeals affirmed the decision of the District Court.

Jurisdiction of the District Court was founded upon 28 U.S.C. Sec. 1335.

THE REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed for the following reason:

The Application of the Kentucky Restoration Statute to Ohio Insurance Contracts, So as to Deprive the Named Beneficiary of the Policy Proceeds, Constitutes a Denial of Due Process to the Named Beneficiary, Who Would Receive the Policy Proceeds Under Ohio Law, and the Full Faith and Credit Clause May Not Be Used to Deprive the Named Beneficiary of Her Rights Under Those Contracts of Insurance.

I.

Kentucky law is not applicable; the Full Faith and Credit clause is not applicable; Due process demands Ohio law apply.

It should first be clearly understood that Phyllis and the Children make no contention that Kentucky law is anything other than that expressed in *Bissell* v. *Gentry,* Ky., 403 S. W. 2d 15 (1966). The Kentucky Court of Appeals' interpretation of Kentucky Revised Statutes (hereinafter referred to as KRS) 403.065 and 403.060 means that in the usual divorce situation, policies of insurance, such as the ones involved in this case, are property to be restored to the appropriate party.

Nonetheless, Phyllis and the Children do not concede that the Kentucky statutes, or the Kentucky Court of Appeals' construction of those statutes, have any bearing upon the case at bar; indeed, they are totally irrelevant. It should be noted that none of the cases cited by the courts below truly disposes of the ques-

tions in this case, as none of those cases ever raises the question of the effect of the Kentucky restoration statutes upon contracts which, by their terms, are not to be governed by the laws of Kentucky. While Charles Wagner and Barbara eagerly contend that Kentucky law determines the various parties' rights, the contracts of insurance provide:

> "This policy is issued and delivered in the State of Ohio and shall be governed by the laws of that State."

It is the contention of Phyllis and the Children that Ohio law must determine who shall receive the *proceeds of the policies* and that Ohio law dictates that Phyllis receive those proceeds.

While the courts below seize upon the full faith and credit clause of the United States Constitution, it is clear that that clause does not apply to this case; in fact, the action of the courts below, in refusing to follow the requirements of Ohio law, violates the due process clause of the Fourteenth Amendment of the United States Constitution.

While the courts below rest their decisions upon what they suppose to be the demands of the full faith and credit clause of the United States Constitution, that provision of our Constitution does not require that contractual terms, freely arrived at by parties, be disregarded. Nor would it require that Ohio blindly disregard its own law as to an Ohio contract simply because one of the contracting parties may at one time have been a resident of another state. It is therefore

immediately apparent that the bare contention that the full faith and credit clause automatically answers all the questions in this case is equally bare of logic. This view is supported by the opinions of the United States Supreme Court in *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 74 L. Ed. 926, 50 Sup. Ct. 338 (1930), and *Hartford Accident and Indemnity Co.* v. *Delta & Pine Land Co.,* 293 U. S. 143, 78 L. Ed. 1178, 54 Sup. Ct. 634 (1935).

In *Home Insurance Co.* v. *Dick,* the Court dealt with a fire insurance policy created, and to be performed, in Mexico. A suit on the contract was brought in Texas, but the Mexican corporation which issued the contract was never in Texas. The Texas court refused to impose limitations provided in the policy on the grounds that a Texas Statute forbade the imposition of such limitations. Of course, since the corporation involved was organized under the laws of a foreign country the full faith and credit clause did not apply; instead, the argument partly concerned the Fourteenth Amendment, which extends its protection to aliens. The Court noted that the Texas Statute purported to create rights and obligations, but the Court stated that Texas could not validly affect contracts which are neither made nor are to be performed, in Texas. Texas may not abrogate the rights of parties beyond its borders, having no relation to anything done or to be done within them. Consequently, it was held that the Texas Statute, as construed and applied, violated the due process clause of the Fourteenth Amendment of the United States Constitution.

Are not the principles of *Home Insurance Co.* precisely the same as those in this case? If Texas may not ". . . abrogate the rights of parties beyond its borders . . .", does Kentucky have a greater right? Clearly, just as the Texas Statute violated the due process clause of the Fourteenth Amendment, so do KRS 403.060 and 403.065 in this case.

In *Hartford Accident and Indemnity Co.* v. *Delta & Pine Land Co.* the Court again held that a state may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if the interest of the forum has but slight connection with the substance of the contract obligations. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interest of the forum as contrasted with those created at the place of the contract, conflicts with the guarantees of the Fourteenth Amendment, the Court said. If the decision of the Courts below is Kentucky law, has not Kentucky, on the grounds of policy, ignored a right which has lawfully vested elsewhere? Have not the Courts below acted as legislators attempting to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated? Again, these acts, condemned by the Court in *Hartford Accident and Indemnity Co.*, conflict with the guarantees of the Fourteenth Amendment.

These principles, enunciated with respect to the due process clause, also apply to arguments based upon the

full faith and credit clause. *Alaska Packers Assoc.* v. *Industrial Accident Commission of California,* 294 U. S. 532, 79 L. Ed. 1044, 55 Sup. Ct. 518 (1935). In *Alaska Packers Association* one Palma had gone to Alaska to work temporarily and was injured there. Alaska had a Workmen's Compensation Statute which provided certain benefits. However, Palma made a Workmen's Compensation claim in California under the California Statute. Limitations provided in the Alaska Workmen's Compensation Act were pleaded, since the parties had contracted that Alaska Law should apply, but the California court applied California law. With respect to the full faith and credit argument the Supreme Court said at page 546:

> "It has often been recognized by this Court that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy. [Citations omitted] [547]. In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent."

Alaska Packers Association stands for the proposition that the decision of the Courts below is not properly founded upon the full faith and credit clause. The Supreme Court recognized the necessity of some accommodation of conflicting interests of two states,

where the policy of one state statute should come into conflict with that of another. The need for that accommodation was never more apparent than in the case at bar. The conflicting interests here can best be accommodated by this Court holding that a contract which specifies that it is to be governed by the laws of Ohio must be governed by those laws.

We are not without guidance in asking the federal courts to make this decision, for the very District Court which decided this case also has decided one of the most significant cases dealing with a situation similar to that at bar. In *Morgan* v. *United States,* 315 F. Supp. 213 (E.D. Ky. 1969), a National Service Life Insurance policy was issued upon the life of one Morgan; his then wife, Martha Gunn Morgan, was named as beneficiary, with certain other persons named as contingent beneficiaries. This designation was in force at the death of the insured. The insured and Martha Gunn Morgan were divorced, and entered into a separation agreement and property settlement, which happened to be silent concerning the policy in question. Subsequently, the insured married the plaintiff, Fannalea Morgan, and they remained married until the insured's death.

In *Morgan,* the District Court took note of the statutorily required restoration clause in the Kentucky divorce decree and stated the question to be as follows:

> "Will a restoration provision in a divorce judgment rendered by a State Court, which adopts a property settlement which is silent as to the disposition of a National Service Life Insurance pol-

icy, operate as a bar to recovery by the first wife-beneficiary who remains the named beneficiary at the date of the veteran's death?"

The District Court then took note of the abundant Kentucky case law concerning restoration and insurance policies and conceded that if the state law controlled, the first wife could not prevail. Nonetheless, the District Court viewed the matter as one involving the "primacy of Federal law" and held that the policy provisions were controlling. The District Court took the position that the policy was a contract with the United States, its terms to be governed by Federal Statutes and Regulations in determining who is to receive the benefits of the policy.

Why is *Morgan* v. *United States* any different from this case? The Sixth Circuit Court of Appeals spoke in terms of "primacy of Federal law" but normally a federal court would be required to give due cognizance to state divorce judgments. Comity does not flow only between the states. Once this is understood, it is certain that the Kentucky courts would not hesitate to treat contracts created in another state differently where those contracts contain specific provisions removing themselves from the jurisdiction of Kentucky law.

This belief as to the probability of Kentucky Court of Appeals' approach in such a situation is not based on faith but upon precedent. Of particular interest is *Clarey* v. *Union Central Life Insurance Co.*, 143 Ky. 540, 136 S. W. 1014 (1911), and *Union Central Life*

Insurance Co. v. *Barnes,* 175 Ky. 364, 194 S. W. 339 (1917).

In *Clarey,* a resident of Wisconsin had had a policy of insurance issued to him by an Ohio company. Subsequently, the insured and his wife were divorced in Kentucky. The insured had named his first wife as beneficiary, and although he married again the first wife remained the named beneficiary. Upon the first wife instituting an action in a Kentucky court, the company pleaded time limitations contained in its policy, which limitations were clearly contrary to the public policy of Kentucky. It was equally clear that such limitations were valid under the laws of both Wisconsin and Ohio. Because of this, the Kentucky Court of Appeals held that it was immaterial whether the contract was to be governed by the laws of Wisconsin or of Ohio, for under either interpretation the plaintiff was barred; and, the court held that Kentucky law did not save the plaintiff's right to prosecute the action. The court held, at 1015:

> "As a general rule, a contract is governed and controlled by the laws of the place where it is made."

The Court considered its decision to be in harmony with the principle that the:

> ". . . proper law of the contract is presumed to be the law of the country where the contract is made (lex loci contractus); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply

> to a contract partly or even wholly to be performed in another country. In other words, the proper law of a contract is the law of the place where it is made. This law governs * * * not only as to its execution, authentication, and construction, but also as to the legal obligations arising from it, and as to what is to be deemed a performance, satisfaction, or discharge."

In *Union Central Life Insurance Co.* v. *Barnes, supra,* the Kentucky Court of Appeals noted that in *Clarey* it had been:

> ". . . Constrained to abide by the rules of comity always recognized and enforced here as elsewhere, rather than to impress its peculiar views upon a foreign contract subjected to litigation here. While it is against the public policy of this state to contract for a period of limitation less than that provided by our statute, where the contract is made and to be performed within the state, the public policy of the state is not affected or infringed by the making of such a contract elsewhere, and, under the rules of comity, we are bound to enforce a contract valid where made. Any other position would be at variance with all authority and entirely indefeasible [sic]."

The Court then noted that under this view it was immaterial that the wife-beneficiary was a resident of Kentucky when the cause of action accrued and when the suit was filed.

The basic point in *Clarey* as expressed in *Union Central Life Insurance Co.* v. *Barnes, supra,* was that life insurance contracts which contain provisions con-

trary to the public policy of Kentucky will yet be enforced by the courts of Kentucky when the contracts of insurance are made, and are to be performed, without the Commonwealth.

Such a rule is the sensible one to follow, and under Ohio conflict of laws rules governing insurance contracts, it is also the rule that the law of the place where the insurance contract was made governs the interpretation of the contract. *Switzer* v. *Carroll,* 358 F. 2d 424 (6th Cir. 1966).

In its opinion, the United States Court of Appeals for the Sixth Circuit admits that Phyllis had a chose in action, by reason of being designated originally as beneficiary, but opined that whether the extinction of this right constituted a deprivation of due process depended upon the nexus between the forum and the interest asserted. This, the Court of Appeals said, made *Home Insurance Company, supra,* and *Hartford Accident and Indemnity Company, supra* "inapposite". The Court therefore takes the inconsistent view that if Kentucky had jurisdiction over *Phyllis,* Kentucky Courts could then disregard the law of Ohio and impose Kentucky law upon these Ohio contracts.

The Court of Appeals opined that the situation was not a case of a state attempting to draw to itself control over contracts elsewhere validly consummated, because, in the Court of Appeals' view, Kentucky does not care about construction of the contract, but only about the division of marital property. This conclusion is an exercise in logic without head or tail. It amounts to saying that Kentucky can apply its law to

these contracts because it is only interested in dividing marital property; implicit in the argument is the assumption that deciding who gets the property does not amount to a construction of the contract. This theory never meets the argument that Kentucky may not divide the property because it has no jurisdiction over it.

The Court of Appeals apparently has the idea that the "construction" term of the contracts means that the operation of the terms of the policy (whatever that means) is to be according to Ohio law, but that this does not include the decision as to who is the proper beneficiary. This goes without citation of any statute, term of the contract or any other authority in support. In fact, the Court of Appeals admits that Kentucky would likely follow the choice of law provision in the contract. This is not much of an admission in view of *Clarey* and *Union Central Life Insurance Co.*, and especially where the Sixth Circuit Court of Appeals itself has recognized that:

> "[u]nder the law of Kentucky, a contract, which by its terms refers to a particular place of performance, is to be construed by the law of the place of performance." *Baumer* v. *Franklin County Distilling Co.*, 135 F. 2d 384 (6th Cir. 1943).

But the Court did concede that to be Kentucky law, and said that the relationship between Travelers and Mead, and Travelers and Jan would be governed by Ohio law. The court conveniently neglected to mention Phyllis in this connection, for if they had, they

would have been obligated to admit that she was a third party beneficiary to this contract. Once they conceded her privity to the contract, they would have to have admitted her rights were governed by Ohio law.

The Court of Appeals said that there is no supremacy rule saying which state law shall prevail as between themselves, and thus Kentucky does not have to yield to Ohio law. But Kentucky does have to yield to Ohio law, because there is a supremacy clause; that supremacy clause is found in the contracts, making Ohio law apply. Taking into consideration Kentucky conflicts rules, Ohio law is supreme in this case.

The Court of Appeals attempts to say that ordinary conflicts rules should be applied, barring Phyllis's claim under the theory of involuntary divestiture. This again is without citation of authority. Kentucky's conflicts rule is that Ohio contract terms, as in *Clarey* and *Union Central Life Insurance Co.,* will be enforced, *even though they violate* Kentucky public policy. Then, however, the Court of Appeals says that the District Court was right because a Kentucky Court would apply the restoration statute to these contracts because to do otherwise would violate Kentucky's public policy of dividing up marital property. This process of reasoning was not applied by the Sixth Circuit Court of Appeals in *Equitable Life Assurance Society of the United States* v. *Aaron,* 108 F. 2d 777 (6th Cir. 1940) where it held that where premiums for insurance policies were paid in Michigan and the policies delivered in Michigan, those policies were Michigan contracts and governed by the laws of that state.

The Federal courts, under the well known principles of *Erie Railway Co.* v. *Tompkins,* 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938), are bound to follow Kentucky law and conclude that if the contract specifies that it is to be governed by Ohio law, and where the contract is in fact an Ohio contract, the contract term prevails and defeats efforts by Charles Wagner and Barbara to evade it. It was error on the part of the Courts below to conclude otherwise.

Based upon the precedent and logic necessary for a consideration of this case, it becomes obvious that the courts below did not act in conformity with Kentucky law, but contrary to it; Phyllis and the Children, on the other hand, are not asking for a decision contrary to Kentucky law, but in conformity with it. The cited cases demonstrate that Kentucky itself does not demand that Kentucky principles of law be utilized to adjudicate contracts created elsewhere and designed to be governed by laws of another state. Likewise, logic demands that Ohio would not be required to disregard its own law. The rules of comity demand that Ohio law be applied to this case.

II.

Ohio Law dictates that Phyllis receive the Insurance proceeds.

Since Ohio law applies, the question now becomes what rights in these policies Phyllis has under Ohio law. The answer is that her rights are total; she is entitled to the complete proceeds of the policies.

The applicable Ohio law is so unequivocal and frequently stated that it appears in even general legal

texts. Thus, in 30 *Ohio Jurisprudence* 2d, Insurance, Section 329, at page 318, the rule is expressed as follows:

> "The fact that the wife, who is the beneficiary in the policy of insurance upon the life of her husband issued prior to the divorce of the parties, is not subject to the objection that the divorce terminated her insurable interest, since the policy, originally valid, does not cease to be so by the cessation of the beneficiary's interest in the life of the insured; in other words, a subsequent divorce does not divest a wife's interest so far as prior insurance is concerned, so as to preclude her from taking the proceeds of the policy, at least where the policy contains no terms indicating that her right thereto is conditioned upon her remaining the wife of the insured. The fact that the insured husband remarries after the divorce does not alter the situation or change this rule."

When Jan executed the designation of beneficiary forms he named Phyllis as beneficiary. He noted her relationship to himself to be "Wife," but under Ohio law this term was merely descriptive. As early as 1900, the Ohio Supreme Court held that the "Wife" appellation is merely descriptive and the named beneficiary will take the policy proceeds even where the insured and named beneficiary are subsequently divorced, and even where the insured actually remarries. *Overhuser* v. *Mutual Life Insurance Co.*, 63 Ohio St. 77 (Ohio 1900). The rule that the extra verbiage "Wife" or "Wife of the insured" is simply unessential description has been

followed as late as 1963, in *Cannon* v. *Hamilton,* 174 Ohio St. 268 (Ohio 1963).

The total effect is that Ohio, sensibly enough, does not construe contracts of insurance to be anything other than what they truly are: contracts, printed on paper, with clearly stated terms governing the parties' respective rights. Thus, in Ohio, the right of a wife to recover the proceeds of an insurance policy does not hinge upon the relationship of husband and wife, but rather is determined by the law of contracts. *Hergenrather* v. *Metropolitan Life Insurance Co.,* 79 Ohio App. 116, 68 N. E. 2d 833 (Ohio 1946). Clear support for this view is found in *Federal Life Insurance Co.* v. *Tietsort,* 131 F. 2d 448 (7th Cir. 1942) *cert. den.* 318 U. S. 768.

Equally as important, from the standpoint of whether this court should grant this petition for a writ of certiorari, is the decision of the Seventh Circuit in *Federal Life Insurance Co.* v. *Tietsort,* that decision is in conflict with the decision of another Court of Appeals on the same matter, to wit, the Sixth Circuit Court of Appeals, within the intendment of Rule 19(1) of the Rules of Supreme Court of the United States.

III.

The Sixth and Seventh Circuit Courts of Appeal have rendered decisions concerning the same legal question and have answered the question in contrary manners, furnishing reason for this Court to grant this petition for a writ of certiorari.

In the case of *Federal Life Insurance Co.* v. *Tietsort, supra,* the Court of Appeals for the Seventh Circuit dealt with a case involving insurance obtained during the first marriage of the insured. The first wife was designated as beneficiary. The Court considered the problem to simply be one of contract; the laws of the state in which the policy was executed and issued (Illinois) were deemed applicable. As the Court stated at 449:

> "The insured's divorce from Ruth for her fault did not affect her rights as beneficiary. Her rights were created by the policy of insurance; they were not created by marriage. [Citations omitted.] If the insured desired to change the beneficiary, he had to comply with the terms of the policy, and since no other selection of a beneficiary was made in the manner prescribed by the policy before the insured died, the beneficiary's selection was valid as a vested interest in the fund."

The Court then held that since it was admitted that the insured had never made an effort to change the name of the beneficiary the divorced, *but designated,* woman was entitled to the proceeds of the policies.

There is a basic conflict in the decisions of the Sixth and Seventh Circuits, because in the instant case the decision is that the laws of Ohio do not determine

the recipient of the proceeds, although the policies were created in that state; the Seventh Circuit held to the contrary. But beyond the misunderstanding by the Sixth Circuit of what law should apply, there is a fundamental difference between the two circuits as to *why* the designated, divorced woman is to receive the proceeds; that is to say, Illinois had a statute at the time of the divorce of Tietsort and her former husband that empowered the state court to restore property to the spouse from whom it came. Since 1874, Section 16, Chapter 40 of the Revised Statutes of Illinois has provided:

> "Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same upon such terms as it shall deem equitable."

That this is a "restoration" statute, having in mind the same effect as that contemplated by KRS 403.060 and 403.065, is made clear by various cases, *e.g., Walsh* v. *Walsh,* 372 Ill. 254, 23 N. E. 2d 341 (1939), *Gilbert* v. *Gilbert,* 305 Ill. 216, 137 N. E. 99 (1922) and *Coonce* v. *Coonce,* 296 Ill. 585, 130 N. E. 349 (1921). So it cannot be argued that Illinois law was so different from Kentucky law as to require a different decision.

Confronted with *Tietsort,* the Sixth Circuit Court of Appeals simply ignored it, thereby avoiding the problem of resolving the conflict between that case and this. Without doubt, the decision of the Seventh Circuit Court of Appeals is in conflict with the deci-

sion rendered in this case. First, the Sixth Circuit Court of Appeals has held in this case that Jan's divorce from Phyllis terminated her rights as beneficiary; the Seventh Circuit Court of Appeals would say that Phyllis's divorce did not affect her rights as beneficiary. Second, the Sixth Circuit says that Phyllis's rights under the policy were created by marriage; the Seventh Circuit would hold that her rights were created by the policy of insurance. Third, the Sixth Circuit has decided that there was an involuntary devestiture by operation of law; the Seventh Circuit would hold that the insured must comply with the terms of the policy relative to change of beneficiary before that change may be effective. Finally, the Sixth Circuit Court of Appeals says that Phyllis had only a chose in action, an expectancy; the Seventh Circuit Court of Appeals would say that she had a vested interest in the proceeds of these policies of insurance.

Ohio law follows the same logical concept of contract law, and *Cannon* v. *Hamilton, supra,* once again demonstrates that Phyllis must prevail. In *Cannon,* as in *Federal Life Ins. Co.* v. *Tietsort,* it was held that a change of beneficiary in a life insurance policy is ordinarily accomplished by following the procedure directed in the policy. Ohio law is obviously that the beneficiary does acquire rights in the policy, even though the insured usually retains the power to alter or terminate those rights; but if those rights are to be affected, say the courts of Ohio, that effect must be brought about in the manner provided by the contract. Whether the interest is called a "right", "expectancy"

or "chose in action" is immaterial, as the substance of Ohio law is that Jan was required to act under Ohio law, pursuant to the terms of an *Ohio* contract. He did not.

The Sixth Circuit Court of Appeals presumes Jan to have known Kentucky law, and this presumption is agreeable to Phyllis, for if he must have known Kentucky law he must also have known Ohio law. Since he knew Ohio law, he just as "presumably desired the result mandated" by Ohio law.

CONCLUSION

We respectfully urge this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit because of the compelling constitutional reasons in this case, and the irreconcilable conflict of the decision of the Sixth Circuit in this case and of the Seventh Circuit Court of Appeals in *Tietsort.*

We urge this decision because the Courts below erred by depriving the named beneficiary of the policy proceeds. This petition is heavy with merit, because the Courts below erred in holding that the Full faith and credit clause required these Ohio contracts to be governed by Kentucky law. Kentucky law, as expressed in *Baumer,* requires that Ohio contracts be governed by Ohio law and these contracts plainly are Ohio contracts.

In Ohio it makes no difference that the named beneficiary no longer has a marital relationship with the insured, so long as that insured has not exercised

his power to change the beneficiary. It is conclusively presumed that he intended no change. A similar rule was recognized by the Seventh Circuit Court of Appeals, but in this case the Sixth Circuit Court of Appeals has disregarded Kentucky law, although Kentucky law requires a similar effect. These conflicting decisions of the Sixth and Seventh Circuit Courts of Appeal require resolution and we respectfully urge this Court to grant this petitioner's request for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, to review the case and to issue a mandate in favor of Phyllis Fields.

Respectfully submitted,

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